order or award of the Collector made under the Act should be set aside. In construing that section and indeed, the Act itself, regard must be had to Article 13 of the Federal Constitution which provides that no person shall be deprived of property save in accordance with law and, even then, subject to the payment of adequate compensation. In my view section 68 of the Act must be read in conjunction with the right guaranteed to the individual by the said Article 13. It is inconceivable that Parliament, in promulgating the Act, had intended to confer upon the Collector a power so absolute as to exclude altogether the supervisory power of the High Court in relation to decisions and awards improperly made under the Act. If section 68 were to be given a literal interpretation, the fundamental right guaranteed by Article 13 would be rendered nugatory. In my view, section 68 applies only to decisions and awards which have been properly made by the Collector.

*Order accordingly.*

Solicitors: *Balwant Singh & Co.*

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## SABDIN GHANI v. MOHAMED SAIDI LAMPOH & 25 OTHER ELECTION PETITIONS

**[O.C.J. (Seah J.) August 24 & 25; November 9, 1981]**

**[Kota Kinabalu – Election Petitions Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 & 26 of 1981]**

*Election Law – Petitions – Motion to strike out – Meaning of "election" – Date of election – Effect of incorrect date – Misdescription and not a nullity – Security for election – "Charge" to be distinguished from "particulars of charge" – Security only for "charges" – Election Offences Act 1954 (Revised 1969), ss. 8, 9, 10, 32 & 34 – Election Petition Rules 1954, rr. 3, 4(1)(b), 12(1) & (2) & 15.*

*Election Law – Notice – Service of – Directory rule and not mandatory – Publication in national English newspaper sufficient – Election Petition Rules 1954, r. 15.*

*Election Law – "Rules of Court" means High Court Rules in operation at time of filing of election petitions – Election Offences Act 1964 (Revised 1969), s. 42(1).*

This case concerned 26 election petitions which challenged the elections of 26 members of the Sabah Legislative Assembly from various constituencies of the State of Sabah following the publication of the results of the Sabah State Election held in the month of March 1981 in the Gazette on April 23, 1981. The petitioners alleged that the 27 respondents herein were personally or by their agents guilty of corrupt practices of aiding, abetting or procuring the commission of the offences of bribery, treating and undue influence before, during and after the said election contrary to the provisions of sections 8, 9, 10, and 32(a), (b) and (c) of the Election Offences Act 1954 (Revised 1969). The petitioners prayed for a determination that all the respondents herein were not elected or returned and that the said elections be declared void. Each of the petitioners deposited the sum of $3,000 as security and notices of the presentation of the election petitions appeared in *The New Straits Times* on May 28, 1981. The said notices further provided that a true copy of the said election petitions may be obtained by the said respondents on application at the Office of the Registrar of the High Court at Kota Kinabalu, Sabah.

The respondents sought to have the petitioners struck out on the grounds, *inter alia*, that the petitioners have failed to comply with the provisions of Rules 3, 4(1)(b), 12(1) & (2) and 15 of the Election Petition Rules 1954 and section 34 of the Election Offences Act 1954 (Revised 1969).

Following the filing of the 26 Notices of Motions, the petitioners in Election Petitions Nos. 1, 3, 6 and 26 of 1981 had applied for leave to withdraw. Election Petition No. 7 of 1981 was struck out on the ground that the petitioner therein had no *locus standi*.

**Held**, dismissing the respondents' Notices of Motions:

(1) although the object of the statute by which the election Tribunal is created is to prevent corrupt and illegal practices, still the Tribunal is a judicial, and not an inquisitorial one. It is a court to hear and determine according to law, and not a commission armed with powers to inquire into and suppress corruption;

(2) the word "election" used in Rule 4 of the Election Petition Rules 1954 should be given a narrow sense to mean the date when the Returning Officer has duly declared a candidate elected after the votes have been counted following a poll;

(3) in view of the wording of Rule 4(1)(b) and Rule 4(4) of the Election Petition Rules 1954, it is not mandatory to state the exact date of the election in the election petition. *A fortiori*, if an incorrect date or dates have been given or stated by the petitioners in the election petitions, this would not vitiate the proceedings for the wrong date or dates could always be amended without causing any injustice to the respondents;

(4) in Election Petitions Nos. 22/81 and 23/81, if the petitioners have not included the date therein, this misdescription does not render the proceedings a nullity since this may be amended at any time without prejudice to the respondents therein named;

(5) in this case, the general allegations of corrupt practices of aiding, abetting or procuring the commission of the offence of bribery, treating and undue influence are sufficient compliance with the law;

(6) a "charge" is to be distinguished from "particulars of a charge" and for the purpose of construing Rule 12(2) of the Election Petition Rules, "particulars of a charge" is not subject to the said Rule 12(2) and that security need not be paid in respect of them but that security is only to be paid "for charges";

(7) an allegation can only form a charge under the said

Rule 12(2) where security is payable if the respondent and/or his agents are accused of corrupt practices, illegal practices or any offences under the Election Offences Act 1954 (Revised 1969);

(8) "rules of court" referred to in section 42(1) of the Election Offences Act 1964 (Revised 1969) means the High Court Rules in operation at the time of the filing of the election petitions;

(9) by advertising a notice of the petition of Election Petition No. 2 of 1981 in *The New Straits Times* on May 28, 1981, this amounted to sufficient compliance with the provisions of Rule 15 of the Election Petition Rules 1954 relating to service of a notice of the election petition in a newspaper circulating in the constituency in which the election was held.

*Obiter Dictum:* "Although the mode of service of the election petition has been extended to include advertisement in a local newspaper following the decision in the case of *Chong Thian Vun* v. *Watson & Anor.* ... The practical difficulty of complying with this mode of service as well as publication in the Gazette has been clearly demonstrated in these proceedings. It is suggested that service of a notice of the petition may be effected by sticking the same on the Notice Board of the High Court where the election petition has been presented. In this way, the petitioner or his advocate need not have to depend on the editor or the local newspaper or the Government Printer to comply with the provisions of Rule 15."

*Cases referred to:*

(1) *Jagan Nath* v. *Jaswant Singh* A.I.R. 1954 S.C. 210.
(2) *Sreenivasan* v. *Election Tribunal* 11 E.L.R. 278.
(3) *Muip* v. *Datuk James Wong* [1971] 1 M.L.J. 246.
(4) *Zulkarnaini* v. *Syed Omar* [1979] 2 M.L.J. 143.
(5) *Wilfred Nissom* v. *Datuk Stephen Yong* Kuching Election Petition No. K. 1 of 1979 (unreported).
(6) *Yeshvantarao Balwantrao Chavan* v. *K.T. Mangalmurti* A.I.R. 1958 Bom. 397.
(7) *Ashraf Ali Khan* v. *Tika Ram* 20 E.L.R. 470.
(8) *Dr. Narayan Bhaskar Khare* v. *Election Commission, India* 13 E.L.R. 112.
(9) *Bhagwati Prasad* v. *J.K. Tandon* A.I.R. 1957 All. 354.
(10) *Chong Thain Vun* v. *Watson & Anor.* [1968] 1 M.L.J. 65.
(11) *Devan Nair* v. *Yong Kuan Teik* [1967] 1 M.L.J. 261.
(12) *K. Kamaraja Nadar* v. *Kunju Thevar* A.I.R. 1958 S.C. 687.
(13) *Ch. Subbarao* v. *Member, Election Tribunal, Hyderabad* A.I.R. 1964 S.C. 1027 @ p. 1032.
(14) *Fothergill* v. *Monarch Airlines* [1980] 3 W.L.R. 209.
(15) *Inland Revenue Commissioners* v. *Ayrshire Employers Mutual Insurance Association Ltd.* [1946] 1 All E.R. 637 @ p. 641.
(16) *Mallappa Basappa* v. *Basavaraj Ayyappa* A.I.R. 1958 S.C. 698 @ p. 701.

ELECTION PETITIONS.

*Raja Abdul Aziz Addruse* for the respondents/applicants.

*D.J. Puthucheary* for the petitioners.

*Cur. Adv. Vult.*

**Seah J.**: A total of twenty-six election petitions numbering 1 to 26 of 1981 have been presented in the High Court at Kota Kinabalu, Sabah, challenging the elections of 26 members of the Sabah Legislative Assembly from various constituencies of the State of Sabah following the publication of the results of the Sabah State Election held in the month of March 1981 in the *Gazette* on April 23, 1981. All the petitioners in the said petitions allege that the 27 respondents herein were personally or by their agents guilty of corrupt practices of aiding, abetting or procuring the commission of the offences of bribery, treating and undue influence before, during and after the said election contrary to the provisions of sections 8, 9, 10 and 32(a), (b) and (c) of the Election Offences Act 1954 (Revised 1969). The said petitioners therefore pray for a determination that all the respondents herein were not elected or returned and that the said elections be declared void.

Each of the 26 petitioners deposited the sum of $3,000 each as security and notices of the presentations of the said 26 election petitions appeared in *The New Straits Times* on May 28, 1981 at page 28 thereof. The said notices further provided that a true copy of the said election petitions may be obtained by the said respondents on application at the Office of the Registrar of the High Court at Kota Kinabalu, Sabah.

Subsequent to the publication in *The New Straits Times*, Notices of Motions were taken out by all the respondents herein to have the 26 election petitions struck out on the grounds, *inter alia*, that the petitioners have failed to comply with the provisions of Rules 3, 4(1)(b), 12(1) & (2) and 15 of the Election Petition Rules 1954 and section 34 of the Election Offences Act 1954 (Revised 1969).

Supporting affidavits are annexed to all the said Notices of Motions and affidavits in reply have been filed herein.

Following the filing of the 26 Notices of Motions the petitioners in Election Petitions Nos. 1, 3, 6 and 26 of 1981 have applied for leave to withdraw their election petitions. However, since these 4 petitioners or their advocates have failed to publish in the Gazette of the intended application for leave to withdraw pursuant to Rule 23 of the

Election Petition Rules 1954 I declined to deal with these 4 applications for leave to withdraw the election petitions on August 24, 1981, but I adjourned the hearing to November 9, 1981 at 9 o'clock in the forenoon after advocates for these 4 petitioners had given an assurance to cause a notice of the intended withdrawal of the said election petitions to be published in the *Gazette* prior to the date fixed for the hearing of these 4 applications. In this judgment, I would not be concerned with Election Petitions Nos. 1, 3, 6 and 26 of 1981. Mr. David Wong is appearing as advocate for all these 4 petitioners in these proceedings and Raja Abdul Aziz Addruse as leading counsel for all the respondents therein.

By consent, the Notices of Motions in respect of Election Petitions Nos. 2, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 of 1981 were heard together. Raja Abdul Aziz Addruse appeared as leading counsel for all the respondents/applicants (hereinafter referred to as the applicants) and he was assisted by Mr. John Kah in Election Petitions Nos. 13, 19, 20 and 21 of 1981, by Mr. Chong Kah Kiat in Election Petitions Nos. 2, 8, 11, 12, 15 and 16 of 1981, by Mr. Clement Skinner in Election Petitions Nos. 4, 9, 14, 23 and 25 of 1981 and by Dr. Yaacob Marican in Election Petitions Nos. 5, 7, 10, 17, 18, 22 and 24 of 1981 respectively. The leading counsel for all the 22 petitioners/respondents (hereinafter referred to as the petitioners) is Mr. Dominic Puthucheary and he was assisted by Encik Abdul Razak Rouse in Election Petitions Nos. 2, 4, 5, 7, 8, 9, 11, 19, 24 and 25 of 1981 and by Datu Nasrun Datu Mansor in Election Petitions Nos. 10, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22 and 23 of 1981 respectively.

In the course of the hearing of these Notices of Motions, Mr. Puthucheary conceded that the petitioner in Election Petition No. 7 of 1981 was not a candidate in the Sabah State Election for the Constituency Ward N. 12 (LABUK) as alleged in the said petition and that the said petitioner, Diding bin Dangan had no *locus standi* to present an Election Petition under the provision of section 34(c) of the Election Offences Act 1954 (Revised 1969). In the light of this I struck out Election Petition No. 7 of 1981 with costs to the applicant, Paul Baklin, to be taxed on parties and parties basis. I also granted a certificate for 2 counsel to the said applicant.

Having set out the preliminaries and before dealing with the merits of the applications and the rival submissions, I would like to say a few words about election petitions in general. In the Indian Supreme Court case of *Jagan Nath* v. *Jaswant Singh*[1] certain general principles governing election proceedings were laid down and they are:

a) The general rule is well-settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power.

b) It is also well-settled that the success of a candidate who has won at an election should not be lightly interfered with and any election petition seeking such interference must strictly conform to the requirements of the law.

c) None of these propositions, however, has any application if the special law itself confers authority on a Tribunal to proceed with a petition in accordance with certain procedure and when it does not state the consequences of non-compliance with certain procedural requirements laid down by it.

d) Though the election of a successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also that people do not get elected by flagrant breaches of the law or by corrupt and illegal practices, and

e) In cases where the election law does not prescribe the consequences or does not lay down a penalty for non-compliance with certain procedural requirements of that law, the jurisdiction of the Tribunal entrusted with the trial of the case is not affected.

In *Sreenivasan* v. *Election Tribunal*[2] a case decided by the Madras High Court, the difference between an election inquiry and an ordinary civil suit was brought out in the following words:

"An election petition is not a matter in which the only persons interested are candidates who strove against each other at elections. The public also are substantially interested in it and this is not merely in the sense that an election has news value. An election is an essential part of the democratic process. The citizens at large have an interest in seeing and they are justified in insisting that all elections are fair and free and not vitiated by corrupt or illegal practices. In a civil action the only persons who are interested are the individuals arrayed as plaintiffs or defendants, but that is not so in an election petition. That is made clear from a consideration of the provisions made in the Act for

the withdrawal of election petition ... In addition to all these a specific duty is imposed on the Tribunal to find whether any corrupt or illegal practice has been practised at the election and if so by whom. In view of the manifest difference between a civil suit and an election petition it will not be right, it seems to me, to press the analogy founded on the basis of a civil suit very far when we have to deal with an election petition."

It must be borne in mind that although the object of the statute by which the election Tribunal is created is to prevent corrupt and illegal practices, still the Tribunal is a judicial, and not an inquisitorial one; it is a court to hear and determine according to law, and not a commission armed with powers to inquire into and suppress corruption.

I would now consider the various grounds relied on by the applicants in the Notices of Motions to strike out the election petitions *in limine*.

First, it is contended that in Election Petitions Nos. 4, 13, 15, 18, 22 and 23 of 1981 the provisions of Rule 4(1)(b) of the Election Petition Rules 1954 have not been complied with in that the petitioners have failed to give the correct dates in the holding of the Sabah State Election for the various constituencies therein mentioned. For example, in Election Petition No. 4 of 1981 for the constituency of Sipitang N. 44, the polling days were March 23, 24, 26, 27 & 28, 1981 (see *Gazette* Notification P.U.(B)184 dated March 19, 1981 at pages 792-794) and whereas in the election petition the dates given are from March 23 to 28, 1981. According to the *Gazette* it is plain that March 25, 1981 was not a polling day for the constituency of Sipitang N. 44. The same complaint is made in respect of:

i) Election Petition No. 13/81 for constituency of Kundasang N. 16;

ii) Election Petition No. 15/81 for constituency of Merotai N. 46;

iii) Election Petition No. 18/81 for constituency of Semawang N. 11;

iv) Election Petition No. 22/81 for constituency of Kuala Kinabatangan N. 29; and

v) Election Petition No. 23/81 for constituency of Sugut N. 10.

Since all these 6 election petitions have incorrectly stated the polling dates for the respective constituencies therein mentioned, it is submitted by leading counsel for the 6 applicants that these said election petitions are defective and on the authority of *Muip* v. *Datuk James Wong*[3] they ought to be struck out and dismissed with costs to the said applicants. Apparently, *Muip's* case was followed in *Zulkarnaini* v. *Syed Omar*[4] and *Wilfred Nissom* v. *Datuk Stephen Yong*[5].

Now, Rule 4 of the Election Petition Rules 1954 reads:

"4(1) An election petition shall contain the following statements:

(a) it shall state the right of the petitioner to petition within section 34 of the Act; and

(b) it shall state the holding and result of the election, and shall briefly state the facts and grounds relied on to sustain the prayer.

(2) The petition shall be divided into paragraphs, each of which, as nearly as may be, shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively, and no costs shall be allowed for drawing or copying any petition not substantially in compliance with this rule, unless otherwise directed by the court or a judge.

(3) The petition shall conclude with a prayer as, for instance, that some specified person should be declared duly returned or elected, or that the election should be declared void, and shall be signed by all the petitioners.

(4) The following form, or one to the like effect, shall be sufficient:"

In *Yeshvantarao Balwantrao Chavan* v. *K.T. Mangalmurti*[6] it was observed:

"Now, in the case of an election there are certain steps to be taken until the poll is taken. In the first place, there is an announcement about the holding of an election. This is followed by nomination of candidates. After the nominations are made, a scrutiny of the nominations is held. After the nominations are scrutinized, a list of validly nominated candidates is prepared. After the list of validly nominated candidates is prepared, there is a stage of withdrawal enabling a candidate to withdraw his candidature. After the withdrawal, if any, a candidate may retire from contest, and finally there is the poll. Indeed, an election is one continuous process involving these steps."

In *Ashraf Ali Khan* v. *Tika Ram*[7] the High Court of Allahabad observed that the word 'election' as used in the Indian Representation of People Act 1951 includes every stage from the time of the notification calling for election is issued till the declaration of the result. And in the case of *Dr. Narayan Bhaskar Khare* v. *Election Commission, India*[8] the Supreme Court of India affirmed, though while interpreting the word 'election' in Article 71(i) of the Constitution, that the word connotes the entire process of electing culminating in a candidate being declared elected. As a result,

the term 'election' has acquired both a wide and narrow meaning. In the narrow sense, it is used to mean the final selection of a candidate which may embrace the result of a poll where there is a polling or a particular candidate being returned unopposed when there is no poll. In the wider sense, the word is used to connote the entire process culminating in a candidate being declared elected (see *Bhagwati Prasad* v. *J.K. Tandon*[9]).

None of the leading counsel for the applicants and the petitioners has addressed me as to the meaning to be attached to the word 'election' in Rule 4(1)(b) and Rule 4(4) of the Election Petition Rules 1954 and whether the word should be construed in the narrow or wider sense. In my opinion, the word 'election' used in Rule 4 should be given a narrow sense to mean the date when the Returning Officer has duly declared a candidate elected after the votes have been counted following a poll. Support for this view may be found in the judgment of Mohamed Zahir J. in the case of *Zulkarnaini bin Mohamed Noor* v. *Syed Omar (supra).*

Now, Rule 4(1)(b) stipulates that an election petition shall, *inter alia,* state the holding and the result of the election and paragraph 2 of the election petition form in Rule 4(4) provides, *inter alia,* that "your petitioners state that the election was holden on the ..... day of ..... 19 ..... when AB, CD and EF were candidates and the Returning Officer has returned AB as being duly elected". It is to be noted that Rule 4(1)(b) does not specify that the dates of the holding and the result of the election should be expressly stated in the election petition. Although the form in Rule 4(4) provides for the date for the holding of the election to be stated but it should be observed that this does not seem to be mandatory because the sub-rule stipulates that "the following form, or one to the like effect, shall be sufficient". In view of the wording of Rule 4(1)(b) and Rule 4(4) thereof, I am of the opinion that it is not mandatory to state the exact date of the election in the election petition. *A fortiori,* if an incorrect date or dates have been given or stated by the petitioners in the election petitions, this would not vitiate the proceedings for the wrong date or dates could always be amended without causing any injustice to the respondents.

I would now deal with the submission of leading counsel for the applicants. The crux of his submission is that the petitioners have stated the polling dates incorrectly in that in certain cases they have included a day as polling day when it was not so gazetted and in others they have excluded a polling day when it was gazetted as a polling day. Now, what is the date of the election? Rule 25(8) of the Elections (Conduct of Elections) (Sabah and Sarawak) Regulations 1968 provides that "when the counting of the votes has been completed the Returning Officer shall forthwith declare as having been elected the candidate to whom the greatest number of votes is given....." and "the Returning Officer shall forthwith after making his declaration under paragraph 8 of Regulation 25 of these Regulations make a return in Form 13 in the First Schedule to these Regulations. He shall also compile a statement of the poll in Form 14 in the First Schedule to these Regulations and shall forward both such return and statement to the Supervisor of Elections who shall cause the name of the member elected together with such statement to be published in the *Gazette*" (see Regulation 27). These 2 regulations have been complied with (see *Gazette P.U.(B) 237* dated April 23, 1981). According to the Gazette, the election results of the 6 disputed elections were declared at the undermentioned date and places, viz:

a) E.P. No. 4/81 (Sipitang N. 44) at Sipitang on March 28, 1981;

b) E.P. No. 13/81 (Kundasang N. 16) at Ranau on March 28, 1981;

c) E.P. No. 15/81 (Merotai N. 46) at Tawau on March 28, 1981;

d) E.P. No. 18/81 (Semawang N. 11) at Sandakan on March 28, 1981;

e) E.P. No. 22/81 (K. Kinabatangan N. 29) at Sandakan on March 28, 1981 and

f) E.P. No. 23/81 (Sugut N. 10) at Sandakan on March 28, 1981.

It is not disputed that the date, viz. March 28, 1981 appears on all the election petitions except 2, namely E.P. No. 22/81 (K. Kinabatangan N. 29) and E.P. No. 23/81 (Sugut N. 10). Applying the construction which I have put to the word 'election' in Rule 4(1)(b) and Rule 4(4) thereof, I am constrained to rule that the applicants in Election Petitions Nos. 4/81, 13/81, 15/81 and 18/81 have failed to prove that the said petitioners have not complied with the provisions of Rule 4(1)(b) of the Election Petition Rules 1954. In Election Petitions Nos. 22/81 and 23/81, if the petitioners have not included the date of March 28, 1981 therein, I hold that this misdescription does not

render the proceedings a nullity since this may be amended at any time without prejudice to the respondents therein named. For these reasons, the first submission therefore fails.

Secondly, it is contended that the petitioners have not given sufficient security as required by Rule 12(1) and (2) of the Election Petition Rules 1954. This ground applies to 21 election petitions only since Election Petition No. 7 of 1981 has been struck out and they are Nos. 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16,17, 18, 19, 20, 21, 22, 23, 24 and 25 of 1981. For the purpose of dealing with this particular ground, leading counsel for the applicants suggested that he would make use of Election Petition No. 2 of 1981 only as the same submission would equally apply to the remaining 20 election petitions and leading counsel for the petitioners agreed with this procedure.

Paragraph 3 of the Election Petition No. 2 of 1981 reads:

"And your petitioner says that the said Dason Gaban (respondent) was personally or by his agents guilty of corrupt practices of aiding, abetting or procuring the commission of the offence of bribery, treating and undue influence before, during and or after the said election contrary to sections 8, 9, 10 and 32(a), (b) and (c) of the Election Offences Act 1954."

Leading counsel for the applicants has submitted that paragraph 3 contains more than 1 charges but the petitioner in Election Petition No. 2 of 1981 has only deposited the sum of $3,000 as security. Rule 12(1) and (2) read:

"12(1) At the time of the presentation of the petition, or within three days afterwards, security for the payment of all costs, charges and expenses that may become payable by the petitioner shall be given on behalf of the petitioner.

12(2) The security shall be to an amount of not less than five hundred dollars. If the number of charges in any petition shall exceed three, additional security to an amount of two hundred and fifty dollars shall be given in respect of each charge in excess of the first three. The security required by this rule shall be given by a deposit of money."

If security as in this rule provided is not given by the petitioner, no further proceedings shall be had on the petition, and the respondent may apply to the judge for an order directing the dismissal of the petition and for the payment of the respondent's costs. The costs of hearing and deciding such application shall be paid as ordered by the judge, and in default of such order shall form part of the general costs of the petition (see Rule 12(3)).

The wordings in Rule 12(1) and (2) appear to be fairly straightforward but the application of the Rule to the facts of the case would pose a lot of difficulty. The question is: How is the word 'charge' to be construed?

In *Chong Thain Vun* v. *Watson & Anor.*[10] Lee Hun Hoe J. (as he then was) had occasion to consider it and this is what the learned judge had to say:

"I think the word 'charge' as used means an accusation of the commission of a corrupt practice or an illegal practice at an election or an accusation of the infringement of any provision of the election law at an election." (See page 75).

I would like to point out that a 'charge' is to be distinguished from "particulars of a charge" and for the purpose of construing Rule 12(2) thereof, it is my opinion that "particulars of a charge" is not subject to Rule 12(2) and that security need not be paid in respect of them but that security is only to be paid for 'charges', as interpreted by Lee Hun Hoe J. (as he then was) in *Chong Thain Vun's case.*

For the applicants it is submitted by leading counsel that paragraph 3 in Election Petition No. 2 of 1981 ought to be interpreted in the manner following:

*1st charge:* The petitioner alleges that the respondent was guilty of aiding the commission of the offence of bribery contrary to section 10 of the Election Offences Act;

*2nd charge:* The petitioner alleges that the respondent was guilty of abetting the commission of the offences of bribery contrary to section 10 of the E.O.A.;

*3rd charge:* The petitioner alleges that the respondent was guilty of procuring the commission of the offence of bribery contrary to section 10 of the E.O.A.;

*4th charge:* The petitioner alleges that the respondent was guilty of aiding the commission of the offence of treating contrary to section 8 of the Election Offences Act;

*5th charge:* The petitioner alleges that the respondent was guilty of abetting the commission of the offence of treating contrary to section 8 of the E.O.A.;

*6th charge:* The petitioner alleges that the respondent was guilty of procuring the commission of the offence of treating contrary to section 8 of the E.O.A.;

*7th charge:* The petitioner alleges that the respondent was guilty of aiding the commission of the offence of undue influence contrary to section 9 of the E.O.A.;

*8th charge:* The petitioner alleges that the respondent was guilty of abetting the commission of the offence of undue influence contrary to section 9 of the E.O.A.;

*9th charge:* The petitioner alleges that the respondent was guilty of procuring the commission of the offence of undue influence contrary to section 9 of the E.O.A.

The total number of charges against the respondent would be 9. If the same charges were to be split into (a) before, (b) during or (c) after the election, this would mean multiplying 9 by 3 = 27 charges against the respondent. If similar charges were to be framed against an agent of the respondent in the same way, there would be 27 charges against him. And if 2 of the agents of the respondent were to be similarly charged, the total charges against the 2 agents would be 54. Add 54 to 27 the grand total number of charges against the respondent and 2 agents of the respondent would be 81 and the amount of security payable under Rule 12(2) would be $20,000 for Election Petition No. 2 of 1981. Since the other 20 election petitions are worded in the same way, it is submitted that the sum of $20,000 is payable as security for each and everyone of these election petitions.

For the petitioner in Election Petition No. 2 of 1981 it is contended by leading counsel that the allegations contained in paragraph 3 of the said election petition should be construed to contain 9 charges only and that these 9 charges should be construed in this manner:

*1st charge:* The petitioner alleges that the respondent or his agents are guilty of corrupt practice of aiding the commission of the offence of bribery before, during and or after the said Election contrary to section 10 of the E.O.A.;

*2nd charge:* The petitioner alleges that the respondent or his agents are guilty of corrupt practice of abetting the commission of the offence of bribery before, during and or after the said Election contrary to section 10 of the E.O.A.;

*3rd charge:* The petitioner alleges that the respondent or his agents are guilty of corrupt practice of procuring the commission of the offence of bribery before, during and or after the said Election contrary to section 10 of the E.O.A.;

*4th charge:* The petitioner alleges that the respondent or his agents are guilty of corrupt practice of aiding the commission of the offence of treating before, during and or after the said Election contrary to section 8 of the E.O.A.;

*5th charge:* The petitioner alleges that the respondents or his agents are guilty of corrupt practice of abetting the commission of the offence of treating before, during and or after the said Election contrary to section 8 of the E.O.A.;

*6th charge:* The petitioner alleges that the respondent or his agents are guilty of corrupt practice of procuring the commission of the offence of treating before, during and or after the said Election contrary to section 8 of the E.O.A.;

*7th charge:* The petitioner alleges that the respondent or his agents are guilty of corrupt practice of aiding the commission of the offence of undue influence before, during and or after the said Election contrary to section 9 of the E.O.A.;

*8th charge:* The petitioner alleges that the respondent or his agents are guilty of corrupt practice of abetting the commission of the offence of undue influence before, during and or after the said Election contrary to section 9 of the E.O.A.; and

*9th charge:* The petitioner alleges that the respondent or his agents are guilty of corrupt practice of procuring the commission of the offence of undue influence before, during and or after the said Election contrary to section 9 of the E.O.A.

In addition to these 9 charges which are based on sections 8, 9 and 10, leading counsel for the petitioner has also submitted that reliance is placed on the provisions of section 32(a), (b) and (c) of the Election Offences Act 1954 (Revised 1969). It is therefore argued that section 32(a), (b) and (c) constitute the remaining 3 charges making a total of 12 charges, and the amount of security payable for 12 charges under Rule 12(2) of the Election Petition Rules 1954 is $2,750. Since the petitioner in Election Petition No. 2 of 1981 has deposited a sum of $3,000 it is submitted that sufficient security has been amply provided for.

Before considering these rival submissions, I would like to quote a passage in *Halsbury's* Laws of England (4th edition) Vol. 14 paragraph 838 at page 458 which reads:

"It is sufficient for the petition to allege the grounds generally, and a petition alleging that the respondent and his agents are charged with bribery, corruption and undue influence and also with illegal practices, would in form be sufficient."

Applying this to paragraph 3 of Election Petition No. 2 of 1981, I rule that the general allegations of corrupt practices of aiding, abetting or procuring the commission of the offence of bribery, treating and undue influence are sufficient compliance with the law. Moreover, leading counsel for the applicant has not complained otherwise.

After giving careful consideration to the rival submissions I prefer the construction given to paragraph 3 of the said election petition by leading counsel for the petitioner. In my opinion, the interpretation of leading counsel for the petitioner accords with the construction of the word 'charge' given by Lee Hun Hoe J. (as he then was) in *Chong Thain Vun's case.* In other words, an allegation can only form a charge under Rule 12(2) where security is payable if the respondent

and/or his agents are accused of corrupt practices, illegal practices or any offences under the Election Offences Act 1954 (Revised 1969). On the other hand, the construction given to paragraph 3 by leading counsel for the applicant is not only punitive but mere repetitions of the same charges of corrupt practices of bribery, treating and undue influence not only by the respondents and/or their agents but also before, during and/or after the election. I do not think such a construction is envisaged by Rule 12(2) of the Election Petition Rules 1954. It follows that the second submission also fails.

Thirdly, it is contended by leading counsel for the applicants that the service of the Notice of Presentation of the Petition herein was not effected in accordance with the provisions of Rule 15 of the Election Petition Rules 1954. Rule 15 reads:

"Notice of the presentation of a petition, accompanied by a copy thereof, shall within fifteen days of the presentation of the petition, be served by the petitioner on the respondent. Such service may be effected either by delivering the notice and copy aforesaid to the advocate appointed by the respondent under Rule 10 or by posting the same in a registered letter to the address given under Rule 10 at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no advocate has been appointed, or no such address given, by a notice published in the *Gazette* or in a newspaper circulating within the constituency or electoral ward in which the election was held stating that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the Registrar."

For the purpose of dealing with this particular ground, it was agreed by the 2 leading counsel for the applicants and the petitioners that Election Petition No. 2 of 1981 would be used and that the same arguments would equally apply to the remaining 20 election petitions. It is not disputed that the respondent in Election Petition No. 2 of 1981 did not avail himself of the provisions of Rule 10 in that he did not appoint any advocate to act for him nor did he give any address within Malaysia at which notice of the petition may be sent. In fact, none of the respondents in the other 20 election petitions took advantage of Rule 10 of the Election Petition Rules 1954. Be that as it may, it is admitted that notices of the presentations of the election petitions were published in *The New Straits Times* on May 28, 1981. As a matter of fact, all the 26 election petitions appeared in the said newspaper on that day.

It is contended by leading counsel for the applicant that if service of Election Petition No. 2 of 1981 was by publication of the Notice in a newspaper, that newspaper must be one which has a circulation within the relevant constituency and in this case, the constituency of Tandek N. 6. It is further submitted that *The New Straits Times* is not a newspaper circulating within the constituency of Tandek N. 6 and consequently, service of the Notice of the presentation of the petition has not been effected in accordance with Rule 15 of the Election Petition Rules 1954. Before dealing with this submission I would state briefly the reasons which led to the publications of the Notices of the presentations of the election petitions in *The New Straits Times* on May 28, 1981, by the advocates appearing for all the petitioners.

a) According to advocate, Encik Abdul Razak Rouse, he filed an election petition challenging the result of the constituency of Tandek N. 6 on May 13, 1981.

b) On May 14, 1981 he wrote to Timbalan Pendaftar, Mahkamah Tinggi, Kota Kinabalu, Sabah, asking him whether there was any book kept in the High Court Registry in accordance with Rule 11 of the Election Petition Rules 1954. A reply was received on the same day confirming that no such book was kept in the Registry.

c) On May 21, 1981 he wrote a letter to the Editors of *"Sabah Times"* and *"Daily Express"* – 2 local English newspapers – enclosing 13 copies of the Notices pursuant to Rule 15 and requesting them to publish the said Notices the next day but not later than May 28, 1981. A reminder was sent to both the Editors on May 25, 1981, and at the same time requesting them to confirm in writing whether they could publish the said Notices by May 28, 1981 but no reply or confirmation was received by the advocate.

d) On May 21, 1981 he also wrote to the Pengarah Jabatan Pencetak Kerajaan, Kota Kinabalu, Sabah, enclosing 13 copies of the said Notices and requesting him to publish the same in the Gazette not later than May 28, 1981. On May 25, 1981 the advocate received a copy of a letter from Pencetek Kerajaan, Sabah, addressed to Setiausaha Kerajaan Negeri, Sabah, seeking permission to publish the said Notices of the presentations of the petitions in the Sabah Government *Gazette*.

e) As time was running out the advocate said that he had to fly to Kuala Lumpur to make the necessary arrangement with *The New Straits Times* to publish all the Notices in their news-

paper and after much persuasion, he managed to get the Notices published on May 28, 1981.

f) Similar facts are expressed by Datu Nasrun Datu Mansor who acts as advocate for the other petitioners.

g) On June 8, 1981 advocate Encik Abdul Razak Rouse received a letter from Pencetek Kerajaan Sabah informing him that approval had already been given by the State Secretary, Sabah, to publish Notices of the presentations of the petitions in the Government *Gazette*. It appears that the State Secretary replied to the Government Printer on June 6, 1981. The Government Printer indicated that the publications would appear in the next issue of the Gazette dated June 11, 1981. On June 11, 1981 the advocate wrote to the Government Printer informing him not to proceed with the publications but to return all the documents.

From these uncontradicted facts it is plain that (a) the Editors of 2 local local newspapers, viz. *"Sabah Times"* and the *"Daily Express"* would not publish the Notices of the presentations of the election petitions in their newspapers in any event as there was no response to the two letters addressed to them and (b) the Government Printer would not be able to publish the said Notices in the Gazette on time, to satisfy the provisions of Rule 15 of the Election Petition Rules 1954. His offer to publish the Notices on June 11, 1981 – well outside the period prescribed by Rule 15 – would appear to be naive, since he knew and must be deemed to know that all the said Notices must be published in the Gazette before May 28, 1981, in order to be valid and effective.

Now, Rule 15 of the Election Petition Rules 1954 has a chequered history.

In *Devan Nair* v. *Yong Kuan Teik*[11] the relevant facts are these. The petitioner, Yong Kuan Teik, filed an election petition against the successful candidate, Devan Nair, the respondent, who did not appoint a solicitor nor leave an address for service under Rule 10. Purporting to act under this Rule the petitioner lodged a copy of the petition the Registrar of the High Court on the last day of service prescribed by Rule 15. He further purported to advertise a notice of the presentation of the petition in the *Gazette* after the period prescribed by Rule 15. The Election Judge struck out the petition on the ground that it had not been served in accordance with Rule 15 and considering that his order was interlocutory, he gave leave to appeal under section 68(2) of the Courts of Judicature Act 1964. The Federal Court set aside his decision but gave leave to appeal to the Privy Council. It was held by the Privy Council that although lodgment of the petition on the Registrar was a literal compliance with Rule 10 there was, in respect of service of petition, an inconsistency between Rules 10 and 15 and in view of the explicit provisions of Rule 15, service in accordance with Rule 10 was insufficient and a petition must be served in accordance with the terms of Rule 15. The terms of Rule 15 were mandatory and not merely directory, and therefore, there being no personal service and the advertisement in the Gazette being out of time, the proceedings were a nullity: no weight could be attributed to the circumstances that the rules contained no express power to strike out a petition for non-compliance with Rule 15 and an election judge had an inherent power to cleanse his list by striking out, or better, by dismissing those petitions which had become nullities by virtue of failure to serve the petition within the time prescribed by the Rules.

Then came the case of *Chong Thian Vun* v. *Watson & Anor. (supra)* where the headnote reads:

"Motions were taken out by the respondents to set aside, three election petitions and one common ground in all three petitions was that the notice of the petition was not served on the respondent within 10 days of the presentation of the petition in accordance with Rule 15 of the Election Petition Rules 1954.

Held by Lee Hun Hoe J. (as he then was) (Election Judge) (1) the Election Petition Rules are mandatory and require strict compliance therewith. Non-compliance with the provisions of the Rules or the Ordinance must necessarily result in a jurisdictional defect and the court has no power to entertain the petitions; (2) all 3 petitions must be struck out on the ground that the service of the notice of the petition was not effected in accordance with the provisions of Rule 15 of the Election Petition Rules 1954."

It should be noted that at that time Rule 15 read:

"Notice of the presentation of a petition, accompanied by a copy thereof, shall within ten days of the presentation of the petition, be served by the petitioner on the respondent. Such service may be effected either by delivering the notice and copy aforesaid to the advocate appointed by the respondent under Rule 10 of these Rules or by posting the same in a registered letter to the address given under Rule 10 of these Rules at such time that, in the ordinary course of post, the letter would be delivered within the time abovementioned, or if no advocate has been appointed, or no such address given, by a notice published in the Gazette stating that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the Registrar."

It is clear that at that time Rule 15 did not contain any provision for publication of the notice of the petition in the newspapers. In *Chong Thain Vun's* case the election petition was lodged with the Registrar on May 31, 1967 and according to the original Rule 15, it must be served on the respondent within 10 days thereof, viz on June 10, 1967. Since the respondent in that case did not avail himself of the provisions of Rule 10 the petitioner tried to serve the said Notice by publication in the Sabah Government *Gazette.* As fate would have it, 5 lino-type machines were not functioning and they became operational only on June 10, 1967 and being a Saturday, the printing of the said notice was not done until June 12, 1967, by which time, publication in the Gazette was plainly out of time. However, following the judgment in *Chong Thain Vun's* case, Rule 15 was amended to allow publication of the notice of the presentation of the petition in a newspaper circulating within the constituency or electoral ward in which the election was held stating that such petition has been presented. Opportunity was also taken to extend the time from 10 to 15 days thereof. Despite the amendment it is clearly demonstrated in these proceedings that unless the Editors of licensed newspapers in Sabah are prepared to co-operate, the amendment would be unworkable. As far as I know, there has been no decision on this amendment. Under the circumstances, I therefore find it necessary to examine the decision of the Privy Council in *Devan Nair's case,* in the light of this amendment.

At p. 264 Lord Upjohn in giving the judgment of the Privy Council said:

"So the whole question is whether the provisions of Rule 15 are "mandatory" in the sense in which that word is used in the law, i.e. that a failure to comply strictly with the times laid down renders the proceedings a nullity; or "directory" i.e. that literal compliance with the time schedule may be waived or excused or the time may be enlarged by a judge. If the latter, it cannot be doubted that the respondent has waived literal compliance by taking a step in the action, that is, by asking for particulars of the petition.

This question is a difficult one as is shown by the conflict of opinion in the courts below.

The circumstances which weigh heavily with their Lordships in favour of a mandatory construction are:

1) The need in an election petition for a speedy determination of the controversy, a matter already emphasised by their Lordships. The interest of the public in election petitions was rightly stressed in the Federal Court, but it is very much in the interest of the public that the matter should be speedily determined.

2) In contrast, for example, to the Rules of the Supreme Court in this country, the rules vest no general power in the election judge to extend the time on the ground of irregularity. Their Lordships think this omission was a matter of deliberate design. In cases where it was intended that the judge should have power to amend proceedings or postpone the inquiry it was expressly conferred upon him, see for example Rules 7, 8 and 9

3) If there is more than one election petition relating to the same election or return, they are to be dealt with as one (Rule 6). It would be manifestly inconvenient and against the public interest if by late service in one case and subsequent delay in those proceedings the hearing of other petitions could be held up.

4) Respondents may deliver recriminatory cases (Rule 8) and speedy service, in order that the respondent may know the case against him, is obviously desirable so that he may collect his evidence as soon as possible.

The case of *Williams* v. *Mayor of Tenby & Ors.* (1879) 5 C.P.D. 135 which has stood the test of nearly 90 years and seems to their Lordships plainly rightly decided, strongly supports the view that the provisions of Rule 15 were mandatory.

On the whole matter their Lordships have reached the conclusion that the provisions of Rule 15 are mandatory, *and the petitioner's failure to observe the time for service thereby prescribed rendered the proceedings a nullity.* (The emphasis is mine).

With all respect to the Federal Court their Lordships cannot attribute weight to the circumstance that the Rules contained no express power to strike out a petition for non-compliance with Rule 15.

... The Election Judge must, however, have an inherent power to cleanse his list by striking out or better by dismissing those *petitions which have become nullities by failure to serve the petition* within the time prescribed by the Rules ....." (emphasis mine).

Under the original Rule 15 the Privy Council held that the petitioner's failure to observe the time for service therein prescribed rendered the election petition a nullity. The amended Rule 15 provides that (a) service of the notice of the petition must be effected within 15 days thereof and (b) if service is to be effected by means of advertisement in a newspaper then it should be a newspaper circulating within the constituency or electoral ward in which the election was held stating that such petition has been presented.

Applying the construction in *Devan Nair's* case to the facts in Election Petition No. 2 of 1981 I hold that the time prescribed by the amended Rule 15 for publication of the notice of the petition in the newspaper is mandatory only and it is not disputed that the petitioner in Election Petition No. 2 of 1981 has complied with the

mandatory provisions of Rule 15 as to time and newspaper. That, however, is not the end of the matter. I have next to consider and to decide whether that part of the provision in Rule 15 that the newspaper circulating within the constituency or electoral ward in which the election was held is to be construed as a mandatory or a directory provision.

In *K. Kamaraja Nadar* v. *Kunju Thevar*(12) the Supreme Court of India had to consider the old section 117 of the Representation of People Act 1951 dealing with "deposit of security" which reads:

"The petitioner shall enclose with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India in favour of the Secretary to the Election Commission as security for the costs of the petition."

The Election Commission was empowered under the former section 85 of the Act to dismiss the election petition for non-compliance with the provisions of section 117 relating to the deposit of security for costs. Similarly, section 90(3) gives to the Election Tribunal power to dismiss an election petition which does not comply with the provision of section 117 notwithstanding that it has not been dismissed by the Election Commission under section 85 thereof.

At p. 696 para 30 the learned N.H. Bhagwati J. in giving the judgment of the Supreme Court of India said:

"Turning now to section 117 we find that it is a provision relating to the deposit of security for the costs of the petition. When a petitioner presents an election petition to the Election Commission under section 81 he is to enclose with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in the Government Treasury or in the Reserve Bank of India in favour of the Secretary to the Election Commission as security for the costs of the petition. The Government Treasury receipt must show that such deposit has been actually made by him either in the Government Treasury or in the Reserve Bank of India; it must also show that it has been so made in favour of the Secretary to the Election Commission and it must further show that it has been made as security for the costs of the petition. These are the three requirements of the section which have to be fulfilled. The question however, arises whether the words "in favour of the Secretary to the Election Commission" are mandatory in character so that if the deposit has not been made in favour of the Secretary to the Election Commission as therein specified the deposit even though made in a Government Treasury or in the Reserve Bank of India and as security for the costs of the petition would be invalid and of no avail. If, for instance, the petitioner made the deposit either in a Government Treasury or in the Reserve Bank of India in favour of the Election Commission itself and obtained a Government Treasury receipt in regard to the same, could it be contended that in spite of such a deposit having been made, the said Government Treasury receipt was not in conformity with the requirements of section 117 and the petitioner could be said not to have complied with the requirements of that section so as to involve a dismissal of his petition under section 85 or section 90(3)?

Para 31. The extreme case illustrated above has been taken by us only in order to demonstrate to what lengths a literal compliance with the provisions of section 117 can be pushed ..... even though the deposit may have been made by a petitioner in favour of the Election Commission and a Government Treasury receipt evidencing the same be enclosed along with his petition the provisions of section 117 of the Act can be said not to have been complied with merely because the deposit was made in favour of the Election Commission and not in favour of the Secretary to the Election Commission. The relationship between the Election Commission on the one hand and the Secretary to the Election Commission on the other need not be scrutinized for the purposes of negativing this contention. It is enough to say that such a contention has only got to be stated in order to be negatived. It would be absurd to imagine that a deposit made either in a Government Treasury or in the Reserve Bank of India in favour of the Election Commission itself would not be sufficient compliance with the provisions of section 117 and would involve a dismissal of the petition under section 85 or section 90(3). The above illustration is sufficient to demonstrate that the words "in favour of the Secretary to the Election Commission" used in section 117 are directory and not mandatory in their character. What is of essence of the provision contained in section 117 is that the petitioner should furnish security for the costs of the petition, and should enclose along with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India, is at the disposal of the Election Commission to be utilised by it in the manner authorised by law and under its control and payable on a proper application being made in that behalf to the Election Commission or to any person duly authorised by it to receive the same, be he the Secretary to the Election Commission or anyone else ..."

The reasoning in *K. Kamaraja Nadar* v. *Kunju Thevar (supra)* was approved in another Supreme Court case of *Ch. Subbarao* v. *Member, Election Tribunal, Hyderabad*(13). In *Ch. Subbarao's* case, the Supreme Court was concerned with the provisions of section 81(3) of the Representation of People Act 1951 which provides that "every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and one more copy for the use of the Election Commission, and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition".

The subject of controversy in this appeal lies in a very narrow compass. The election petition

filed was accompanied by the number of copies required to accompany the petition under section 81(3). The election petition was typewritten and the copies which accompanied the petition were carbon copies of the type-script so there was no question of the copies being other than "true" copies. The copies bore 2 signatures in original of the petitioner authenticating both the contents of the petition as well as the verification thereof. The petitioner did not, however, insert the words "true copy" before or above his signatures. The learned judges of the High Court considered that this rendered the petition one not in accordance with section 81(3) of the Act and it is on this ground that the election petition was dismissed and it is the correctness of this decision that was canvassed before the Supreme Court.

The Supreme Court held that

"if the signatures now found on the copies were intended to authenticate the document to which it is appended, viz. the copy, it would only mean that the copy did not reproduce the signature in the original. There is no compelling necessity to hold that the signatures were merely intended to be a copy of those on the original in order to spell out a non-compliance with section 81(3) seeing that a signature in original was not needed on the copy and a writing copying out the name of the signatory would suffice. The decision of this Court in *Mururka's case* C.A. Nos. 30 and 31 of 1963 D/7-5-1963(SC) is authority for the position that the absence of a writing in the copy indicating the signature in the original would not detract the copy from being a true copy. In the circumstances, we consider that there has been substantial compliance with the requirement of section 81(3) in the petition that was filed by the appellant and the learned judges were in error in directing the dismissal of the petition ...".

Following these and other decisions section 117 of the Representation of People Act 1951 had been amended and it now reads as follows:

"117. Security for Costs: (1) At the time of presenting an election petition, the petitioner shall deposit in the High Court in accordance with the rules of the High Court, a sum of two thousand rupees as security for the costs of the petition.

(2) During the course of the trial of an election petition, the High Court may, at any time, call upon the petitioner to give such further security for costs as it may direct."

It is urged by leading counsel for the petitioners that the court should give a "purposive and not a literal construction" to this amendment to Rule 15 of the Election Petition Rules 1954 in order to give effect to the said amendment. According to my research, the "purposive" approach was adopted for the first time by the House of Lords in the case of *Fothergill* v. *Monarch Airlines*[14] where the relevant headnote reads:

"On March 13, 1975 the plaintiff returned from holiday in Italy in an aircraft of the defendants' airline and, on arrival at Luton Airport, found that a suitcase that was part of his luggage was badly torn. He immediately reported the fact that one of the seams of the suitcase was torn away from the case to a representative of the airline. A "property irregularity report" was completed; under the heading "Nature of Damage" there was inserted "Side seam completely parted from the case. (Damage) occurred on inbound flight". When he arrived home, the plaintiff found that some of his personal effects were missing from the suitcase. He notified his own insurers who passed his claim onto the defendants about 4 weeks later. The defendants accepted liability for the torn suitcase but rejected the plaintiff's claim for the value of the missing articles because he had not complained of that "damage" within 7 days as required by article 26(2) of the Convention. Kerr J. gave judgment for the plaintiff on his claim for a declaration that no complaint was required under article 26(2) in respect of partial loss of contents of the suitcase and that, accordingly, he was entitled to £28.50 damages including £16.50 for the loss of such contents, but he further held that if, contrary to his view, a complaint or notice concerning loss of contents was required by article 26 such requirement had not been complied with on March 13, 1975. The Court of Appeal dismissed an appeal by the defendants.

On appeal by the defendants to the House of Lords, it was held, allowing the appeal – (1) that in construing article 26(2) a purposive and not a literal construction should be applied; that having regard to the purpose of article 26(2) and to dictionaries, legal textbooks, articles in legal journals and (per Lord Scarman) the decisions of foreign courts and the travaux preparatoires leading up to the Hague Protocol of 1955 "damage" or "avarie" in article 26(2) included partial loss of the contents of baggage; and that, accordingly, a complaint by the plaintiff of such loss had been required within 7 days of the date of receipt of the baggage by him; (2) that the property irregularity report had not constituted a sufficient complaint of loss of part of the contents of the plaintiff's suitcase; and that, accordingly, his claim failed."

At p. 222 Lord Diplock referred to the words of Lord Simonds in *Inland Revenue Commissioners* v. *Ayrshire Employers Mutual Insurance Association Ltd.*[15]

"The section ... section 31 of the Finance Act 1933 is clearly a remedial section ... It is at least clear what is the gap that is intended to be filled and hardly less clear how it is intended to fill that gap. Yet I can come to no other conclusion than that the language of the section fails to achieve its apparent purpose and I must decline to insert words or phrases which might succeed where the draftsman failed."

Then his Lordship continued:

"The unhappy legacy of this judicial attitude, although it is now being replaced by an increasing willingness to give a

purposive construction to the Act, is the current English style of legialative draftsmanship ..."

However, in the next paragraph his Lordship cautioned and said:

"So far as purely domestic legislation is concerned it is well established as a principle of interpretation that, even where the words of a statute are ambiguous or obscure, the proceedings in Parliament during the course of the passage of the Bill may not be resorted to for the purpose of ascertaining what ambiguities or obscure provisions mean. The reasons why the nature of the parliamentary process at Westminster would make this an unreliable and inappropriate guide to the interpretation of a statute have been often stated by this House and need no repeating. So Hansard can never form part of the "travaux preparatoires" of any Act of Parliament whether it deals with purely domestic legislation or not. Where the Act has been preceded by a report of some official commission or committee that has been laid before Parliament and the legislation is introduced in consequence of that report, the report itself may be looked at by the court for the limited purpose of identifying the "mischief" that the Act was intended to remedy, and for such assistance as is derivable from this knowledge in giving the right purposive construction to the Act. Only to this limited extent are what would in continental legal systems be classified as "travaux preparatoires" legitimate aids to the construction of an Act of Parliament of the United Kingdom which deals with what is purely domestic legislation ..."

Next, I would like to refer to Elections (Conduct of Elections) (Sabah and Sarawak) Regulations 1968 which are made by the Election Commission with the approval of the Yang di-Pertuan Agong under section 16 of the Elections Ordinance 1958 and Rule 3 reads:

"3(1) On the issue of a writ in accordance with the provisions of section 12 of the Ordinance the Election Commission shall publish a notice thereof in the Gazette and in one or more daily newspapers circulating in Sabah or Sarawak, as the case may be ..."

It is pertinent to note that notice of the writ of election is to be published in one or more daily newspapers circulating in the State of Sabah or Sarawak only and not in a newspaper circulating within the constituency or electoral ward in which the election is to be held as in Rule 15 of the Election Petition Rules 1954.

Now, section 42 of the Election Offences Act 1954 (Revised 1969) provides:

"42(1) The procedure and practice on election petitions shall be regulated by rules of court.

(2) Until varied or revoked by rules of court, the rules contained in the Second Schedule shall be in force."

In my opinion, "rules of court" means the High Court Rules in operation at the time of the filing of the election petitions. Since the Rules of the High Court in Borneo 1963 had been replaced by the Rules of the High Court 1980 since June 1, 1980, it is my opinion that the expression "rules of court" in section 42(1) means the Rules of the High Court 1980.

In *Devan Nair's* case Lord Upjohn said that the circumstances which weighed heavily with their Lordships in favour of a mandatory construction of the old Rule 15 are, *inter alia* –

"(2) In contrast, for example, to the Rules of the Supreme Court in this country, the rules vest no general power in the election judge to extend the time on the ground of irregularity. Their Lordships think this omission was a matter of deliberate design."

Since than, the provisions of Order 70 of the Rules of the High Court in Borneo 1963 dealing with the effect of non-compliance had been amended and replaced by a new provision which is similar to the English one in 1976. The new provision in the Rules of the High Court 1980 is Order 2 which now reads:

"Order 2. EFFECT OF NON-COMPLIANCE

1(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order herein."

Although Order 2 r. 1(1) of the Rules of the High Court 1980 is not strictly relevant to what I have to determine, I mention it here inasmuch as reference was made to it by Lord Upjohn in *Devan Nair's* case as one of the factors which weighed heavily with their Lordships in the Privy Council in favour of adopting a mandatory construction of the old Rule 15.

Rule 15 of the Election Petition Rules 1954 prescribes the various methods of serving the election petition on the respondent. At one time service of the petition could only be effected by means of (a) personal delivery, (b) registered post and (c) publication in the Gazette. Following the aftermath of *Chong Thain Vun's* case and 2 other Sabah election cases, Rule 15 was amended to allow service of the election petition by advertise-

ment in a newspaper circulating within the constituency or electoral ward in which the election was held stating that such petition has been presented. This amendment came into existence after the Privy Council had considered the old Rule 15 in *Devan Nair's* case and I have explained that when the Privy Council ruled that the old Rule 15 was mandatory in the sense in which the word was used in the law, it means that a failure to comply strictly with the times laid down rendered the proceedings a nullity. To leave the matter in no doubt at all Lord Upjohn at p. 265 said that "on the whole matter their Lordships have reached the conclusion that the provisions of Rule 15 are mandatory, and the petitioner's failure to observe the time for service thereby prescribed rendered the proceedings a nullity". In other words, their Lordships in the Privy Council made it quite clear that because of petitioner's failure to publish the notice of the petition in the *Gazette* within the period of 10 days of the presentation of the election petition rendered the proceedings a nullity. Time according to their Lordships was therefore of essence of the matter.

For the purpose of determining the present Rule 15 in relation to service of the notice of the petition in a newspaper circulating within the constituency or electoral ward of Tandek No. 6 in which the election was held, 3 matters have to be considered. First, did the petitioner publish such a notice within the prescribed period of 15 days of the presentation of Election Petition No. 2 of 1981. Secondly, did the petitioner publish the said notice in a newspaper. And lastly, was the newspaper one circulating within the constituency or electoral ward of Tandek No. 6 in which the election was held. On the affidavit evidence, I am satisfied that the petitioner in Election Petition No. 2 of 1981 has complied with the first 2 conditions. In fact, leading counsel for the applicants does not contend otherwise. What he is complaining is that *The New Straits Times* is not a newspaper circulating within the constituency or electoral ward of Tandek N. 6 in which the election was held. To my mind, this raises the question whether or not condition 3 is to be given a mandatory or directory construction. In short, leading counsel for the applicants is not saying that the petitioner has not complied with Rule 15; what he is saying is that the said petitioner has not complied with the provisions of Rule 15 strictly.

The affidavit evidence of Encik Abdul Razak Rouse, advocate for the said petitioner, Zulkifle bin Majun, illustrates that there existed a practical difficulty in complying with the literal provision of Rule 15 relating to service of a notice of the petition by means of an advertisement in the Sabah newspapers. Since both the editors of the local English newspapers did not even have the courtesy to respond to his letters, it could be assumed that they would not have published the notice of the petition in their newspapers under any circumstances. Moreover, the Government Printer had not given any indication that the said notice would be published in the *Gazette* on or before May 28, 1981. Faced with such a dilemma Encik Abdul Razak Rouse had to make a decision. If he sat tight and did nothing, the practitioner would not be able to comply with the provisions of Rule 15. If he were to remain inactive and waited for the outcome of the Government Printer's letter to the State Secretary, Sabah, the publication in the *Gazette* might appear after the period prescribed by Rule 15 and the petitioner would be faced with the decision of *Devan Nair's* case and the proceedings would be a nullity. Encik Abdul Razak Rouse did the next best thing; he flew to Kuala Lumpur and according to him, it was after much persuasion that he managed to get the said notice published in *The New Straits Times* on May 28, 1981 – the last day allowed under Rule 15. I think it is conceded by leading counsel for the petitioners that *The New Straits Times* is not a newspaper circulating in all the constituencies or electoral wards in which the election was held and which form the subject matters of these proceedings, inasmuch as some of the constituencies or electoral wards are not accessible to vehicular traffic. To use a common expression, some of the constituencies or electoral wards are known as "Ulu" constituencies or electoral wards. But it is common knowledge that *The New Straits Times* is a national English newspaper with a circulation in all the major towns throughout Malaysia. Now, when the amendment to Rule 15 was made to allow service of the petition by advertisement in a newspaper circulating in the constituency or electoral ward in which the election was held, the primary consideration, I think, is to see how best the election petition can be brought to the personal attention of the respondent. The main purpose of the publication in the newspaper, is, I think, to bring the election petition to the notice of the person to be served and it is hoped that by means of the advertisement, this will come to the knowledge of the respondent. Having said this and in the light of the decision of the Privy Council in *Devan Nair's* case, I am of the opinion that condition 3 aforesaid ought to be given a directory and not a mandatory sense.

After the advertisement of the notices of the petitions in *The New Straits Times* on May 28, 1981 notices of motion were taken out by all the respondents therein named to strike out all the 26 election petitions on various grounds. These show that all the respondents had notice of the said petitions inasmuch as they have all instructed advocates to take action to have all the petitions struck out. On the facts, and applying the principle set out by the Supreme Court of India in the case of *K. Kamaraja Nadar* v. *Kunju Thevar (supra)* and the case of *Ch. Subbarao* v. *Member, Election Tribunal, Hyderabad (supra)* I hold and rule by advertising a notice of the petition of Election Petition No. 2 of 1981 in *The New Straits Times* on May 28, 1981 this amounted to sufficient compliance with the provisions of Rule 15 of the Election Petition Rules 1954 relating to service of a notice of the election petition in a newspaper circulating in the constituency or electoral ward of Tandek N. 6 in which the election was held. In my opinion, it is not necessary to give a literal interpretation to condition 3 of Rule 15 relating to service of a notice of the petition in a newspaper as I have already held that this condition 3 is not mandatory but directory only. Since there was sufficient compliance with the provisions of Rule 15 I hold and rule that there is no good ground to strike out or dismiss Election Petition No. 2 of 1981 on the ground of non-compliance inasmuch as the proceedings are not a nullity. The same ruling also applies to the other Election Petitions which are the subject of the Notices of Motions taken out by the applicants. It follows that the third submission also fails.

Lastly, it is submitted by leading counsel for the applicant in Election Petition No. 26 of 1981 that this petition has not been presented in accordance with Rule 3 of the Election Petition Rules 1954 in that the same was not delivered by the petitioner's advocate appointed under Rule 9 of the said Rules. However, since this petition is the subject of a withdrawal by the petitioner which will be dealt with on November 9, 1981 leading counsel for the applicant agreed not to proceed further with this submission but to leave it till November 9, 1981. I agreed with this procedure and would refrain from considering it in this judgment.

For the above reasons and in the light of my findings and conclusions, I order that the 21 Notices of Motions in respect of Election Petitions Nos. 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 of 1981 be dismissed. Election Petition No. 7 of 1981 has earlier been struck out by me on August 24, 1981. I will hear arguments as to costs of these proceedings.

There are 2 observations I would like to make. First, I would like to suggest that Rule 12 and Rule 15 be amended having regard to the facts brought out in this judgment. In India, at one time, there were a lot of controversies regarding the interpretation of the old section 117 of the Representation of People Act 1951 dealing with security for costs. This section has now been replaced by a new one which reads:

> "117(1) At the time of presenting an election petition, the petitioner shall deposit in the High Court in accordance with the rules of the High Court a sum of two thousand rupees as security for the costs of the petition.
>
> (2) During the course of the trial of an election petition, the High Court may, at any time, call upon the petitioner to give such further security for costs as it may direct."

As to the amount of security to be deposited by a petitioner, it is for the authority to determine having regard to local conditions, and Article 118 of the Constitution of Malaysia.

The other matter relates to the provisions of Rule 15. Although the mode of service of the election petition has been extended to include advertisement in a local newspaper following the decision in the case of *Chong Thain Vun* v. *Watson & Anor. (supra)* the practical difficulty of complying with this mode of service as well as publication in the Gazette has been clearly demonstrated in these proceedings. It is suggested that service of a notice of the petition may be effected by sticking the same on the Notice Board of the High Court where the election petition has been presented. In this way, the petitioner or his advocate need not have to depend on the editor of the local newspaper or the Government Printer to comply with the provisions of Rule 15. In India, after an election petition has been presented, and if the Election Commission accepts it, the Commission has to cause a copy thereof to be published in the Gazette and another copy to be served by post on each of the respondents named therein and then refer the election petition to the Election Tribunal or Judge for trial (see *Mallappa Basappa* v. *Basavaraj Ayyappa*[16] and the Indian Representation of People Act 1951). In short, in India, service of the election petition is effected by the Election Commission and not by the petitioner.

*Motions dismissed.*

Solicitors: *Rithauddeen & Aziz; Skrine & Co.*